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Nathan V. Gemmiti

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# PORSCHE OR PINTO? THE IMPACT OF THE "MOTOR VOTER REGISTRATION ACT" ON BLACK POLITICAL PARTICIPATION

NATHAN V. GEMMITI\*

## I. INTRODUCTION

The Declaration of Independence proclaims that the government derives its "powers from the consent of the governed."<sup>1</sup> The framers of the Constitution wrote the words, "We the People," to create a country founded on the principles of freedom, democracy, and equality.<sup>2</sup> Ironically, these ideals co-existed within a political structure that excluded from the right to self-government anyone who was not a white landowning male.<sup>3</sup> The creative contradiction of "all men are created equal," did not begin to erode until the ratification of the Fifteenth Amendment in 1870, when Black<sup>4</sup> men in America were given the right to vote.<sup>5</sup> It would be another fifty years before Black women would also be enfranchised.<sup>6</sup> Since the adoption of the Bill of Rights, five constitutional amendments have dealt with voting.<sup>7</sup> The United States' history of political disenfranchisement lingers and continues to perpetuate a democratic system where only half of the population votes.<sup>8</sup> As recently as 1965, when Martin Luther King, Jr. led non-violent protests in Selma, Alabama, to bring civil rights to the nation's attention, only

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\* Executive Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.

<sup>1</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>2</sup> U.S. CONST. pmble.

<sup>3</sup> See *infra* notes 55-58. In the first presidential election of George Washington, only 6% of the population voted. Donald W. Rogers, *Introduction: The Right to Vote in American History, in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY* 6 (Donald W. Rogers ed., 1992).

<sup>4</sup> I use "Black" throughout this Note to refer to American citizens of African descent. "Black" is capitalized because it denotes racial and cultural identities, not solely physical appearance. Conversely, the word "white" is not capitalized because it is not ordinarily used in the same sense. See Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 64 n.7 (1993).

<sup>5</sup> See U.S. CONST. amend. XV, § 1.

<sup>6</sup> See U.S. CONST. amend. XIX, § 1.

<sup>7</sup> See generally U.S. CONST. amends. XIV, XV, XIX, XXIV, XXVI.

<sup>8</sup> See NELSON W. POLSBY & AARON WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES IN AMERICAN POLITICS* 3 (9th ed. 1996).

2.1% of the state's registered voters were Black—although Blacks comprised 57.6% of the population.<sup>9</sup>

"If democracy is America's civil religion, voting is its most important sacrament."<sup>10</sup> In 1964, the Supreme Court pronounced: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."<sup>11</sup> Still, millions of eligible Americans do not exercise this right.<sup>12</sup> In 1992, the U.S. had its highest voter participation rate in twenty years; more than 104 million voted.<sup>13</sup> However, over eighty-five million Americans who were eligible to vote did not.<sup>14</sup> The dismal reality is that the United States ranks almost last among the world's democracies in voter turnout—twenty-three out of twenty-four.<sup>15</sup>

The most dominant explanation for this lack of political participation is overly restrictive voter registration laws.<sup>16</sup> Once registered, Americans tend to vote at roughly similar rates as Western Europeans.<sup>17</sup> In the United States, voter registration does not occur automatically as a benefit of citizenship as it does in most countries.<sup>18</sup> An individual must take the requisite steps to register to vote.<sup>19</sup> In states that have

<sup>9</sup> See David Kunset, *Introduction to VOTING RIGHTS IN AMERICA* 1, 9 (Karen McGill Arrington et al. eds., 1992). In Selma, only 156 of over 15,000 eligible Blacks were registered. *See id.*

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>12</sup> See POLSBY & WILDAVSKY, *supra* note 8, at 3.

<sup>13</sup> *See id.* at 5.

<sup>14</sup> *See id.* at 3. Voter turnout for recent presidential elections: 1960 (65.4%); 1964 (63.3%); 1968 (62.3%); 1972 (57.1%); 1976 (55.2%); 1980 (54.3%); 1984 (55.2%); 1988 (50.1%); 1992 (55.2%). *See id.* at 5.

<sup>15</sup> *See id.* at 4. Australia (93.8%); Belgium (93.4%); Austria (90.5%); Italy (90.5%); Iceland (90.1%); Luxembourg (87.3%); New Zealand (87.2%); Sweden (86.0%); Netherlands (85.8%); Denmark (85.7%); Greece (84.5%); Germany (84.3%); Norway (84.0%); Israel (79.7%); Finland (77.6%); Canada (75.5%); United Kingdom (75.4%); Portugal (72.6%); Japan (71.4%); Spain (70.6%); Ireland (68.5%); France (66.2%); United States (52.8%); Switzerland (46.1%). *See id.* (citing THOMAS T. MACKIE & RICHARD ROSE, *THE INTERNATIONAL ALMANAC OF ELECTION HISTORY* (1991)).

<sup>16</sup> *See generally* POLSBY & WILDAVSKY, *supra* note 8, at 8.

<sup>17</sup> *See id.* at 9. Average turnout of registered voters: Australia (93.8%); Belgium (93.4%); Austria (90.5%); Italy (90.5%); Iceland (90.1%); Luxembourg (87.3%); New Zealand (87.2%); United States (86.8%). *See id.* Registration and voting by registrants in percentages: 1968 (74.3% registered / 91% of registered voters who voted); 1972 (72.3%/87%); 1976 (66.7%/89%); 1980 (66.9%/89%); 1984 (68.3%/88%). *See* FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 262 (1988).

<sup>18</sup> *See* POLSBY & WILDAVSKY, *supra* note 8, at 9–10.

<sup>19</sup> *See id.* at 10.

liberal registration policies, such as election-day registration, the turnout rate is considerably higher than the rest of the country.<sup>20</sup>

Of the millions of Americans who do not participate in their government, many Blacks have been locked out by barriers that are the "vestiges of the crudest forms of exclusion and intimidation of the past."<sup>21</sup> Voter registration laws were initially developed by reconstructionist white males in response to a fear that newly freed Black slaves would have an influence over the political system.<sup>22</sup> The history of the United States is plagued with "Jim Crow"-type<sup>23</sup> discriminatory registration laws designed to decrease Black voting strength and maintain the socio-economic and political status quo.<sup>24</sup> Remnants of these laws still exist today and continue to disenfranchise many eligible Black voters.<sup>25</sup> Nationally, only 37% of the eligible Black population went to the polls in 1994.<sup>26</sup>

A muted minority political voice translates into lower accountability from politicians and a lack of proportional representation. For example, only one out of one hundred Senators are Black, although Black Americans comprise 13% of the population.<sup>27</sup> In addition, when a state's voter participation rate is high, economic benefits are more evenly spread to all residents throughout that state.<sup>28</sup>

<sup>20</sup> See *id.* at 11. Maine (73.9%); Minnesota (73.2%); Wisconsin (67.2%); North Dakota, which has no voter registration requirement, (66.5%). See *id.* (citing KIMBALL W. BRACE, *THE ELECTION DATA BOOK* 7, 10 (1992)).

<sup>21</sup> Kunset, *supra* note 9, at 3.

<sup>22</sup> See *Hearings on Voter Registration Before the Subcomm. on Elections of the Comm. on House Admin.*, 101th Cong. 136 (1989) [hereinafter *1989 Hearings*] (testimony of Jesse Jackson, President, National Rainbow Coalition); see also Note, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HARV. C.R.-C.L. L. REV. 483, 485 (1988) [hereinafter *Purging of Empowerment*]; Burt Neuborne, *Edited Comments on Affirmative Action in the Economic and Political Contexts*, 95 ANN. SURV. AM. L. 431, 432 (1995) (stating voter registration may have been imposed as an anti-corruption measure; however, structurally it allowed the political elite to keep power).

<sup>23</sup> The term refers to the systematic practice of segregating and suppressing Black Americans. The term is derived from a character named Jim Crow in a play by Thomas D. Rice. See AMERICAN HERITAGE DICTIONARY 704 (William Morris ed., 1976).

<sup>24</sup> See Rogers, *supra* note 3, at 12.

<sup>25</sup> See *id.*; Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL'Y REV. 370, 372 (1991); see also Eric T. Secoy, Note, *Providing Access to Voter Registration: A Model State Statute*, 24 HARV. J. ON LEGIS. 479, 489 (1987). "[I]ndirect barriers [to voting] may be just as effective in abridging rights as direct barriers." *Id.*

<sup>26</sup> See *Minorities Take Leave of Democracy*, HARTFORD COURANT, Oct. 13, 1996, at B2. Nearly 47% of registered whites cast ballots, also a dismal turnout. See *id.*

<sup>27</sup> See Donna Cassata, *Freshman Class Boasts Resumes to Back Up 'Outsider' Image*, CONG. Q. WKLY. REP., Nov. 12, 1994, at 9. In addition, only 4% of the 1994 Freshman Congress was Black. See *id.*

<sup>28</sup> See Bob Minzesheimer & Martha T. Moore, *Lifting the Curtain on Low Turnout: Big Money,*

This Note suggests that, as a result of a history of voter discrimination in the United States, Black Americans register at lower rates than white Americans.<sup>29</sup> The National Voter Registration Act of 1993 (NVRA or the Act),<sup>30</sup> nicknamed the "Motor Voter Act,"<sup>31</sup> was written to reduce the direct and damaging effect that restrictive federal registration laws have on Black voter participation.<sup>32</sup> The NVRA reduced many barriers by shifting the onus to register from the individual to the government. The Act was a good start. However, in order to give a voice to *all* citizens, the federal government should institute more inclusive programs used by some states. This would achieve the ultimate goal of achieving higher voter participation among all Americans.<sup>33</sup>

Part II will provide an overview of America's history of discrimination against Black citizens, in order to fully understand the gravity of the barriers to voting equality. Part III will trace the legislative history of the NVRA, to illustrate that significant opposition still exists to removing registration barriers. Part IV will evaluate the successes and limitations of the NVRA, which was instituted nationwide for the first time in the 1996 Presidential elections. Finally, Part V will explore election-day registration, an alternative state program that has demonstrated the most successful voter participation rates in the country.

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*Media, Dull Race Among Factors Behind Apathy*, USA TODAY, Nov. 8, 1996, at 4A. *But see* Everett Carroll Ladd, *Participation in American Elections*, in *VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY*, 115 (Donald W. Rogers ed., 1992) (concluding low participation rates do not damage a democratic system because voters and non-voters have virtually the same interest).

<sup>29</sup> Although this statement applies to Hispanic and Asian citizens, the Note will only evaluate voter turnout for Blacks. For an in-depth analysis of the impact of minority voting in a democratic political system, see generally WILLIAM R. KEECH, *THE IMPACT OF NEGRO VOTING: THE ROLE OF THE VOTE IN THE QUEST FOR EQUALITY* (1968).

<sup>30</sup> National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 42 U.S.C.S. §§ 1973gg-10 (Supp. 1993)) [hereinafter NVRA].

<sup>31</sup> The Act received this "nickname" due to a major provision allowing for voter registration at state agencies including the Department of Motor Vehicles. *See generally id.* §§ 1973gg-5.

<sup>32</sup> *See id.* § 1973gg (listing Congressional findings upon which the Act was based).

<sup>33</sup> This Note does not suggest that all citizens must vote; non-voting is also acceptable in our political system. However, the decision not to vote should be made by the individual, not forced upon him or her by a failure to surmount a bureaucratically imposed voting barrier. *See* Pervill Squire, *Is On-Site Voter Registration Desirable?*, in *CONTROVERSIAL ISSUES IN PRESIDENTIAL SELECTION* 229, 236 (Gary L. Rose ed., 1991). For a comprehensive analysis on the right not to vote, see generally Jeffrey A. Blomberg, Note, *Protecting the Right Not to Vote for Voter Purge Statutes*, 64 *FORDHAM L. REV.* 1015 (1995).

## II. A NATIONAL HISTORY OF RACIAL DISCRIMINATION

### A. *Enslavement: America's Original Sin*

The first Black Americans were indentured servants or apprentices—not slaves.<sup>34</sup> England had no history of slavery; therefore, the first twenty Black individuals brought to Jamestown in 1619 had the same status in society as white indentured servants.<sup>35</sup> At the time, there were no discriminatory laws; Black and white colonists lived, worked, and socialized together on an equal basis.<sup>36</sup>

Upon completion of their indentured servitude, these Black pioneers followed the “American Dream.”<sup>37</sup> They earned money, bought property, and had indentured servants of their own.<sup>38</sup> Blacks voted in eleven of the thirteen original colonies and held minor political offices.<sup>39</sup>

However, their social status began to deteriorate.<sup>40</sup> Speaking a different language, having different customs, and darker skin pigmentation began to translate to biological assumptions of Black inferiority.<sup>41</sup> As the colonies grew and experienced labor shortages, Black inferiority became the rationale for enslavement.<sup>42</sup> Eventually, slavery was legalized in six of the thirteen colonies between 1619 and 1664.<sup>43</sup>

Beginning in 1630 with the *Hugh Davis Case*, colonial courts began to lay the legal foundation for racial inferiority.<sup>44</sup> Hugh Davis was a white male Virginian.<sup>45</sup> He was tried for having sexual relations with a Black woman.<sup>46</sup> The court sentenced him to whipping for “defiling his body in lying with a negro.”<sup>47</sup> After 1640, Black Americans could

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<sup>34</sup> See LAWRENCE J. HANKS, *THE STRUGGLE FOR BLACK POLITICAL EMPOWERMENT IN THREE GEORGIA COUNTIES* 2 (1987); DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 11–12 (1978).

<sup>35</sup> See HANKS, *supra* note 34, at 2.

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See *id.*

<sup>40</sup> See FEHRENBACHER, *supra* note 34, at 14.

<sup>41</sup> See *id.*; HANKS, *supra* note 34, at 3.

<sup>42</sup> See HANKS, *supra* note 34, at 3.

<sup>43</sup> See *id.* at 2.

<sup>44</sup> See *id.* at 4.

<sup>45</sup> See *id.* at 3.

<sup>46</sup> See *id.*

<sup>47</sup> HANKS, *supra* note 34, at 3.

no longer be indentured servants and all Blacks who came to the colonies came as slaves.<sup>48</sup>

By the Revolutionary War, slavery became accepted as an integral part of the colonial economic system.<sup>49</sup> There was little organized opposition to slavery except by a Quaker group founded in 1688 called the "Society of Friends."<sup>50</sup> The lack of opposition is ironic: the colonists were struggling for their own freedom, yet many owned slaves.<sup>51</sup>

During the Revolutionary War, more than five thousand Black soldiers fought in the Continental forces.<sup>52</sup> Although colonial freedom was won with the aid of Black Americans, they did not achieve their own independence from slavery.<sup>53</sup> In fact, in this new nation founded on democratic principles and equality, 20% of the entire population was enslaved.<sup>54</sup>

The Declaration of Independence was intended to be a "philosophical expression of the democratic ethos on which the Revolution was fought . . . ."<sup>55</sup> Yet, the gaps between the ideal and reality become obvious when reading passages espousing equality and unalienable rights purported by a society with a slave population of 20%.<sup>56</sup> Abolitionist leader William Lloyd Garrison later called the hypocrisy within the Constitution "a covenant with death and an agreement with hell!"<sup>57</sup> Indeed, without the right to freedom and confidence that one's safety and security are not constantly in jeopardy, the pursuit of happiness becomes difficult, if not impossible.<sup>58</sup>

The apparent contradiction can be reconciled when one considers that according to the ideology of the day, Blacks were considered to be less than human and viewed as "inferior creatures incapable of

<sup>48</sup> See *id.* at 3-4. Massachusetts was the first colony to legalize slavery in 1641. See *id.* at 4. Other colonies followed: Connecticut, 1650; Virginia, 1661; Maryland, 1663; New York and New Jersey, 1664; South Carolina, 1682; Rhode Island and Pennsylvania, 1700; North Carolina, 1715; and Georgia, 1750. See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See generally *id.* at 4-5. In fact, a fugitive slave was the first person to die in the Revolutionary War. See *id.*

<sup>52</sup> See HANKS, *supra* note 34, at 4-5.

<sup>53</sup> See *id.* at 5.

<sup>54</sup> See *id.* In 1776, the Black population was 570,000 out of a total population of 2,500,000; 40,000 were "free persons of color." See *id.*

<sup>55</sup> *Id.* at 5.

<sup>56</sup> See *id.*

<sup>57</sup> ERIC BLACK, OUR CONSTITUTION: THE MYTH THAT BINDS US 44 (1988). Garrison and his followers would not participate in any form of American elections because they believed they would be supporting "the pro-slavery, war sanctioning Constitution of the United States." PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 1 (1996).

<sup>58</sup> See HANKS, *supra* note 34, at 6.

handling the responsibility of citizenship.”<sup>59</sup> This logic was often justified in Biblical terms: “the Negro was a heathen and barbarian, an outcast among peoples of the earth, a descendant of Noah’s son Ham, cursed by God himself and doomed to be a servant forever on account of an ancient sin.”<sup>60</sup>

Thomas Jefferson, known as “the greatest champion of liberty this country has ever had,”<sup>61</sup> owned more than 150 slaves.<sup>62</sup> Jefferson, a founding father of this “free” nation, was unsure about the potential for the mental development of Black Americans.<sup>63</sup> He had no doubts about the present inferiority of Black Americans; however, he was unsure if it was a natural consequence or one created by slavery.<sup>64</sup> Two years before the Constitution was written he wrote:

Some [Black slaves] have been liberally educated, and all have lived in countries where the arts and sciences are cultivated to a considerable degree. . . . But, never yet could I find that a [B]lack uttered a thought above the level of narration, never see even an elementary trait of painting, or sculpture. . . . The improvements of the [B]lacks in body and mind, in the first instances of their mixture with whites . . . prove that their inferiority is not the effect merely of their condition of life.<sup>65</sup>

Following the enactment of the Constitution, Vermont was the first state to move towards abolishing slavery.<sup>66</sup> In its 1777 state constitution, Vermont allowed slaves to receive their freedom at age twenty-one for men, and eighteen for women.<sup>67</sup> By 1804, slavery was outlawed in all the northern states, except Maryland and Delaware.<sup>68</sup> Although many were free in the North, there was not equality under the law.<sup>69</sup> State statutes did not allow equality in employment, education, housing, criminal justice, and voting rights.<sup>70</sup>

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<sup>59</sup> *Id.* at 7.

<sup>60</sup> FEHRENBACHER, *supra* note 34, at 12.

<sup>61</sup> FINKELMAN, *supra* note 57, at 105 (quoting EDMUND MORGAN, *AMERICAN SLAVERY—AMERICAN FREEDOM* 376 (1975)).

<sup>62</sup> *See id.* For a complete history of Thomas Jefferson’s ties to slavery, see *id.* at 105–67.

<sup>63</sup> *See HANKS, supra* note 34, at 7–8.

<sup>64</sup> *See id.* at 8.

<sup>65</sup> *Id.*

<sup>66</sup> *See id.* at 10.

<sup>67</sup> *See id.*

<sup>68</sup> *See HANKS, supra* note 34, at 10.

<sup>69</sup> *See id.*

<sup>70</sup> *See id.*



The philosophical tension between the Declaration of Independence, state constitutions, and slavery was resolved in the *Dred Scott* decision of 1857.<sup>71</sup> Dred Scott was a slave, owned by a military surgeon, and brought to a free state where he lived with his wife for four years.<sup>72</sup> Subsequently, Scott went to Missouri, a slave state, and sued for his freedom, claiming he and his wife were permanently freed by living for so long in a free state.<sup>73</sup> The Supreme Court, denying Scott's claim, held that the Founding Fathers were not referring to Blacks when they used the words "men," "people of the United States," and "citizens."<sup>74</sup> Chief Justice Taney strengthened notions of Black inferiority when he concluded Blacks had "no rights which the white man was bound [by the law] to respect."<sup>75</sup>

Abraham Lincoln also walked an ideological tightrope during this era.<sup>76</sup> He professed there was no moral reason why Black Americans should not have the inalienable rights guaranteed by the Declaration of Independence, while he simultaneously allowed the perpetration of white dominance under the law.<sup>77</sup> In 1861, Congress passed an amendment to the Constitution that slavery would never be abolished.<sup>78</sup> Acting contrary to his stated moral beliefs, President-elect Lincoln endorsed the amendment; he believed Congress did not have the legal power to abolish slavery.<sup>79</sup> Fortunately, the amendment failed to be ratified by the States.<sup>80</sup>

At the famous Lincoln/Douglas debates Lincoln said:

I have no purpose directly or indirectly to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so. I have no purpose to introduce political and social equality between the white and [B]lack races. . . . But I hold that notwithstanding all this, there is no reason in the world why

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<sup>71</sup> See *id.* at 9.

<sup>72</sup> See BLACK, *supra* note 57, at 45. For a complete history of the facts of the Dred Scott Case, see generally FEHRENBACHER, *supra* note 34, at 239-448.

<sup>73</sup> See BLACK, *supra* note 57, at 45.

<sup>74</sup> See HANKS, *supra* note 34, at 9.

<sup>75</sup> *Id.* The case was decided by a vote of 7-2. See BLACK, *supra* note 57, at 45. The Scotts were later freed by their master and lived in St. Louis where Dred Scott worked as a hotel porter and his wife, Harriet, as a laundress. See *id.* at 46.

<sup>76</sup> See HANKS, *supra* note 34, at 8.

<sup>77</sup> See *id.*; BLACK, *supra* note 57, at 41.

<sup>78</sup> See *id.*; BLACK, *supra* note 57, at 41.

<sup>79</sup> See BLACK, *supra* note 57, at 41.

<sup>80</sup> See *id.*

the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty, and the pursuit of happiness.<sup>81</sup>

Although Lincoln was relatively progressive for his day, he failed to recognize that enslavement and inalienable rights cannot co-exist.<sup>82</sup> Several factors facilitated the movement to illegitimize slavery including: (1) white sympathy to freedom in light of their participation in the Revolutionary War; (2) opinions that slavery was neither efficient nor profitable; and (3) beliefs that all races had inalienable rights.<sup>83</sup>

When Abraham Lincoln was sworn in as president in 1860, he became a national voice for the anti-slavery movement.<sup>84</sup> The pro-slavery South seceded because they believed "once in control of the power and patronage of the federal government, the anti-slavery forces will introduce the debate into the South, build up a party there, set non-slaveholder against slaveholder, and bring about abolition of slavery by the orderly process of state constitutional action."<sup>85</sup>

Historians differ as to the precise reason for the Civil War, which lasted from 1861 to 1865.<sup>86</sup> There are three primary contributory causes: (1) war was forced on the South to abolish slavery; (2) the war was a reaction by the South to an overly powerful centralized federal government; and (3) the war was due to dissimilar economic structures between the North and South.<sup>87</sup> Regardless of which was the largest stimulant, most historians agree "there would not have been a civil war if there had not been slavery."<sup>88</sup> At the conclusion of the Civil War, the United States was re-unionized and slavery was legally abolished.<sup>89</sup>

### B. *The Reconstructionist Era*

The Reconstructionist Era began when General Lee surrendered to the Union's forces in 1865.<sup>90</sup> The Thirteenth Amendment was pass-

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<sup>81</sup> HANKS, *supra* note 34, at 8.

<sup>82</sup> *See id.*

<sup>83</sup> *See id.* at 10.

<sup>84</sup> *See id.* at 12.

<sup>85</sup> *Id.* at 8 (quoting HENRIETTA BUCKMASTER, LET MY PEOPLE GO: THE STORY OF THE UNDERGROUND RAILROAD AND THE GROWTH OF THE ABOLITIONIST MOVEMENT 132 (1941)).

<sup>86</sup> *See* HANKS, *supra* note 34, at 8.

<sup>87</sup> *See id.* at 11-12.

<sup>88</sup> *Id.* at 12.

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

ed that year, which guaranteed freedom from slavery.<sup>91</sup> The Military Reconstruction Act of 1867 required Southern states to amend their constitutions to grant male suffrage, regardless of race, as a condition of re-admission to the Union.<sup>92</sup> However, Black citizens could vote freely in only five New England states—Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.<sup>93</sup> This amounted to only 6% of the national Black population.<sup>94</sup> In fact, between 1865 and 1868, white voters rejected legislation that would have given Black men the right to vote in Connecticut, Wisconsin, Kansas, Ohio, Michigan, and New York.<sup>95</sup>

In order to give Southern Blacks a political weapon to enforce the Reconstruction Act, the Fourteenth and Fifteenth Amendments were ratified.<sup>96</sup> The Fourteenth Amendment, adopted in 1868, granted citizenship to "all persons born or naturalized in the United States."<sup>97</sup> The Fifteenth, adopted in 1870, provided that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."<sup>98</sup> In addition, the Enforcement Act of 1870 "provided for criminal sanctions against those who interfered with the constitutionally guaranteed right to vote."<sup>99</sup> This Act opened the ballot box to Black men by prohibiting discriminatory state election laws, and outlawing physical threats and intimidation.<sup>100</sup>

During the early Reconstruction, there was an unprecedented period of Black political empowerment and participation.<sup>101</sup> By 1868, more than 700,000 Black men were registered to vote.<sup>102</sup> At the state level, where the Black population was high, Black representation was high.<sup>103</sup> For example, in the state constitutional conventions, which met between 1867–68, there were many Black elected officials.<sup>104</sup> In Ala-

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<sup>91</sup> See BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 4 (1992).

<sup>92</sup> See *id.*

<sup>93</sup> See HANKS, *supra* note 34, at 12.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.* at 13.

<sup>96</sup> See *id.*

<sup>97</sup> U.S. CONST. amend. XIV, § 1; see also GROFMAN, *supra* note 91, at 4.

<sup>98</sup> U.S. CONST. amend. XV, § 1; see also GROFMAN, *supra* note 91, at 5.

<sup>99</sup> GROFMAN, *supra* note 91, at 5.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See *id.* Nationwide voter participation in 1876 was 81.8%. See Rogers, *supra* note 3, at 11.

<sup>103</sup> See HANKS, *supra* note 34, at 14.

<sup>104</sup> See *id.*; see also GROFMAN, *supra* note 91, at 5.

bama, 18 of 108 were Black; in Florida, 18 of 45; in Georgia, 33 of 170; in Mississippi, 17 of 100; in Louisiana there was equal representation; and in South Carolina there was even a Black majority, 76 of 124.<sup>105</sup> Although there were no Black governors, six lieutenant governors were Black.<sup>106</sup> Between 1860 and 1880, a total of sixteen Blacks served in Congress (two in the Senate, and fourteen in the House of Representatives).<sup>107</sup> At this time, about 15% of the officeholders in the South were Black—a larger proportion than in 1990.<sup>108</sup>

This time period was not only marked by mere numerical presence, but by tangible accomplishments.<sup>109</sup> Historian Robert C. Goldston recognized the strength of these advancements:

They [Black elected officials] provided for universal suffrage by removing property requirements for voting; abolished the medieval system of imprisoning people for debt; abolished such cruel and unusual punishment as whipping and branding; reduced the number of crimes for which a man could be executed . . . and established statewide free public school systems (the first in Southern history). Although they did not redistribute the land, they did pass laws to protect the small farmer, and attempted to institute a rational system of taxes. Nor were these benefits intended exclusively for Negroes. They were vital advantages also to the poor Southern whites. In effect, the Reconstruction state governments were attempting to bring about a peaceful *socio-economic revolution* in Southern society which would have benefited most Southern whites as well as Negroes . . . .<sup>110</sup>

The first Civil Rights Act was passed in 1875.<sup>111</sup> It gave Blacks in the South many of the rights Black Americans have today.<sup>112</sup> These include an equal right to vote and access to public accommodations.<sup>113</sup> Lawrence J. Hanks, an author and advocate of Black political empow-

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<sup>105</sup> See HANKS, *supra* note 34, at 14; GROFMAN, *supra* note 91, at 5.

<sup>106</sup> See HANKS, *supra* note 34, at 14.

<sup>107</sup> See *id.*

<sup>108</sup> See BERNARD GROFMAN & CHANDLER DAVIDSON, *CONTROVERSIES IN MINORITY VOTING* 10 (1992). Of course, a larger percentage of the South was Black in the 1800s. See *id.* at n.15.

<sup>109</sup> See HANKS, *supra* note 34, at 14.

<sup>110</sup> *Id.* at 14–15.

<sup>111</sup> See *id.* at 15.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

erment, has characterized the Reconstructionist Era as "the apex of black political success, and an instance in which the government was an instrument of social betterment for [B]lack . . . ."<sup>114</sup> [R]ough political and social equality was a reality."<sup>115</sup> Unfortunately, these gains toward political and social equality would prove to be short-lived.<sup>116</sup>

### C. *Losing Ground*

Between 1873 and 1876, the Supreme Court destroyed parts of the Fourteenth and Fifteenth Amendments and declared part of the Enforcement Act of 1870 unconstitutional.<sup>117</sup> It would take almost one hundred years to overcome these discriminatory rulings.<sup>118</sup>

In *United States v. Reese*, the Court overturned the indictments of two election officials who had refused to accept the vote of a Black citizen in Kentucky, and had been charged with violating provisions of the Enforcement Act.<sup>119</sup> Provisions of the Enforcement Act were struck down as overbroad because they did not confine themselves to discrimination on the basis of race alone, thereby exceeding congressional power.<sup>120</sup> The Court stated:

[The F]ifteenth Amendment extends no positive guarantees of the franchise, and does not "confer the right of suffrage upon anyone" but merely prohibits both the federal and state governments from excluding persons from voting by reason of race, color, or previous condition of servitude. . . .<sup>121</sup> Thus, there was no positive guarantee of the [B]lack person's right to vote.<sup>122</sup>

In *United States v. Cruikshank*, eight men were convicted under the Enforcement Act for participating in a mob that massacred sixty Blacks in Louisiana.<sup>123</sup> They appealed their convictions under Section 6 of the

<sup>114</sup> HANKS, *supra* note 34, at 15.

<sup>115</sup> *Id.*

<sup>116</sup> *See id.*

<sup>117</sup> *See id.* at 16.

<sup>118</sup> *See infra* notes 179-82, discussing the Voting Rights Act of 1965. For a history of "Dred Scott"-type cases in federal courts, see generally PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 236-84 (1981).

<sup>119</sup> *See* GROFMAN, *supra* note 91, at 6.

<sup>120</sup> *See id.* at 6-7.

<sup>121</sup> *See* HANKS, *supra* note 34, at 16.

<sup>122</sup> *See id.*

<sup>123</sup> *See* GROFMAN, *supra* note 91, at 7.

Enforcement Act, which protected the enjoyment of rights or privileges guaranteed by the *federal* Constitution from conspiracies.<sup>124</sup> The Supreme Court held that the conspiracy that the defendants were engaged in was aimed at a *state* right not a *federal* right, and therefore was not subject to federal protection.<sup>125</sup> The Court held that the only rights the federal government could protect were in federal elections and voting free from racial discrimination.<sup>126</sup> Chief Justice Morrison R. Waite, writing for the Court stated, "[w]e may suspect that race was the cause of the hostility; but it was not so averred."<sup>127</sup> Section 6 of the Enforcement Act was not actually struck down in *Cruishank*; however, the court's extremely limited interpretation made it virtually worthless.<sup>128</sup>

The highest court in the United States had interpreted the Act that was designed to give teeth to the Fourteenth and Fifteenth Amendments in a manner which "crippled the efforts of Congress to protect the right to vote against both official and private interference."<sup>129</sup> These decisions paralleled a retreat from federal involvement in the voting process in the South.<sup>130</sup> Left to their own devices, the South would promote white supremacy and have nothing to do with voting equality.<sup>131</sup>

In 1868, a Congressional subcommittee collected data that "[o]ver 2,000 persons were killed, wounded and otherwise injured in [Louisiana] within a few weeks prior to the presidential election; half the State was overrun by violence; midnight raids, secret murders, and open riot kept the people in constant terror . . . ."<sup>132</sup> This chaos can be attributed to the legalization of racial prejudices which were codified during state constitutional conventions beginning in the late 1800s.

#### D. *Southern State Law: Black Disenfranchisement Solidified*

Although many states had enacted statutes designed to reduce the number of Blacks eligible to vote, in the 1890s many states held conventions to amend their constitutions in order to prevent any remit-

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<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> *Id.*

<sup>128</sup> See *id.*; HANKS, *supra* note 34, at 17.

<sup>129</sup> GROFMAN, *supra* note 91, at 7.

<sup>130</sup> See *id.*

<sup>131</sup> See HANKS, *supra* note 34, at 17-18.

<sup>132</sup> GROFMAN, *supra* note 91, at 6.

tance of Black political influence.<sup>133</sup> The leader was Mississippi's state constitutional convention in 1890, which enacted the "Mississippi Plan"—subsequently adopted by all other Southern states in varying degrees.<sup>134</sup> The convention instituted residency requirements of two years that would disenfranchise Black sharecroppers;<sup>135</sup> certain crimes which were believed committed more frequently by Blacks would result in disenfranchisement; poll taxes were instituted;<sup>136</sup> and registering to vote was required four months before an election.<sup>137</sup> Mississippi's "crowning achievement" was the "understanding clause," which required a voter to read a section of the state constitution and provide a "reasonable" interpretation of any section read to him.<sup>138</sup>

These requirements were later amended to further ensure prohibitions against Black men registering to vote, including the requirement that citizens "must demonstrate an understanding of the duties and obligations of citizenship and possess 'good moral character.'" <sup>139</sup> The most devastating aspect of these tests was the broad degree of discretion the state-appointed local registration and election officials had in evaluating these voting requirements.<sup>140</sup> This discrimination resulted in almost complete Black disenfranchisement.<sup>141</sup>

For example, former U.S. Representative John H. Buchanan, Jr. testified before Congress regarding the overt double standards that existed as recently as the late 1940s.<sup>142</sup> When he was twenty-one in Birmingham, Alabama, he went to the voter office to register for the first time.<sup>143</sup> He noticed a number of Blacks struggling through the

<sup>133</sup> See HANKS, *supra* note 34, at 19.

<sup>134</sup> See *id.*; see also FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 27 (1990).

<sup>135</sup> See Cunningham, *supra* note 25, at 377. Sharecroppers were usually hired on a seasonal basis, therefore they were more mobile. See *id.*

<sup>136</sup> See HANKS, *supra* note 34, at 19. For example, in Mississippi, voters had to pay \$2 to be fully qualified to vote. In many counties, the sheriff would simply refuse to accept payments from Blacks. See PARKER, *supra* note 134, at 28.

<sup>137</sup> See HANKS, *supra* note 34, at 19.

<sup>138</sup> See GROFMAN, *supra* note 91, at 8; HANKS, *supra* note 34, at 19; PARKER, *supra* note 134, at 27.

<sup>139</sup> PARKER, *supra* note 134, at 27.

<sup>140</sup> See *id.* at 27-28. State appointment was used to avoid any Black influence in the selection of local officials in predominantly Black areas. See *id.*; see also *Purging of Empowerment*, *supra* note 22, at 485 (citing J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF A ONE-PARTY SOUTH 1880-1910 48 (1974)).

<sup>141</sup> See PARKER, *supra* note 134, at 27.

<sup>142</sup> See *Hearings on Voter Registration Before the Subcomm. on Elections of the House Comm. on House Admin.*, 100th Cong. 442-43 (1988) (statement of Hon. John H. Buchanan, former Member of Congress) [hereinafter *1988 Hearings*].

<sup>143</sup> See *id.* at 442.

infamous "literacy tests."<sup>144</sup> He picked one up, leafed through the complicated questions of law, constitutional interpretation, and historical fact, and knew he could not answer many of the questions.<sup>145</sup> He approached the registrar and said he was afraid he would not be able to vote because he could not pass the literacy test.<sup>146</sup> The registrar asked, "Who was the first President of the United States?" He answered, "George Washington."<sup>147</sup> "You passed," the registrar announced.<sup>148</sup>

In Louisiana, in 1867, 84,527 Blacks were registered to vote compared to 45,189 white registered voters.<sup>149</sup> Fearful of this power, in 1898, Louisiana held a constitutional convention with the sole purpose to disenfranchise Black voters.<sup>150</sup> As a result, Louisiana contributed the "grandfather clause" to the rapidly growing list of disenfranchising devices.<sup>151</sup> This clause did not actually disenfranchise additional voters, but rather it exempted illiterate whites from "literacy tests."<sup>152</sup> The Louisiana Constitution provided—"no male, or son or grandson of such male, who was entitled to vote on January 1, 1867 [the year prior to the enactment of the Fourteenth Amendment], was to be denied the right to vote."<sup>153</sup>

In South Carolina, the "Eight Box Laws" were adopted.<sup>154</sup> Eight categories of elections were held and each category was given a separate ballot box.<sup>155</sup> Ballots were not counted if they were placed in the incorrect box, making it impossible for those who could not read to cast ballots.<sup>156</sup> In order to ensure that this practice only affected Black

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<sup>144</sup> See *id.*; see also PARKER, *supra* note 134 (stating literacy tests were the most prominent device of Black disenfranchisement, due to the complicated nature of the test and the disqualification of Blacks if their responses were not "letter perfect"). Literacy tests were upheld because "in our society where newspapers, periodicals, books and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise [to vote]." *Lassiter v. Northhampton Bd. of Elections*, 360 U.S. 45, 51-52 (1959).

<sup>145</sup> See 1988 Hearings, *supra* note 142, at 442 (statement of Hon. John H. Buchanan, former Member of Congress).

<sup>146</sup> See *id.*

<sup>147</sup> *Id.* at 442-43.

<sup>148</sup> *Id.*

<sup>149</sup> See *Purging of Empowerment*, *supra* note 22, at 486 (citing Teachout, *Louisiana Underlaw*, in *SOUTHERN JUSTICE* 61 (L. Friedman ed., 1965)).

<sup>150</sup> See generally *United States v. Louisiana*, 225 F. Supp. 353, 369 (E.D. La. 1963) (tracing the history of disenfranchisement of Blacks in Louisiana).

<sup>151</sup> See GROFMAN, *supra* note 91, at 9. See *United States v. Louisiana*, 225 F. Supp. at 369.

<sup>152</sup> See GROFMAN, *supra* note 91, at 9.

<sup>153</sup> *Id.*

<sup>154</sup> See *id.* at 7.

<sup>155</sup> See *id.* at 7-8.

<sup>156</sup> See *id.*



citizens, election officials were instructed to aid only white voters in placing ballots in the proper boxes.<sup>157</sup>

These practices were subtle compared to the Democratic Party's whites-only primary.<sup>158</sup> The Democratic Party believed that since it was a private organization, it operated outside any constitutional requirements.<sup>159</sup> Therefore, the Party could actively discriminate if it desired.<sup>160</sup> The whites-only primaries, instituted across the South, held that only whites were eligible for party membership and permitted to nominate party candidates.<sup>161</sup>

In *Williams v. Mississippi*, the Supreme Court once again reinforced disenfranchisement by upholding these types of voter registration limitations.<sup>162</sup> In *Williams*, a Black man was convicted of murder by an all white jury that was chosen from the voter registration rolls. The rolls virtually excluded the Black population.<sup>163</sup> The Court held that the defendant's due process of law was not violated by the mere existence of these various requirements (understanding tests, poll taxes, lengthy residency requirements, etc.).<sup>164</sup> The Court concluded no violation of the Fourteenth Amendment existed because, "[the voting laws] do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."<sup>165</sup>

With the Court's opinions in hand, many Southern whites began a virtual war against the political power of Black Americans.<sup>166</sup> Secret organizations like the Ku Klux Klan began to swell in numbers.<sup>167</sup> During the 1890s, there was an average of 154 lynchings per year, all in the South, and all the victims were Black.<sup>168</sup>

By the 1900s Black Americans in the South were practically excluded from the voting process.<sup>169</sup> The Federal Government had lost

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<sup>157</sup> See GROFMAN, *supra* note 91, at 8.

<sup>158</sup> See *id.* at 9.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> See *id.*

<sup>162</sup> See GROFMAN, *supra* note 91, at 8.

<sup>163</sup> See *id.* at 10.

<sup>164</sup> See *id.*

<sup>165</sup> *Id.*

<sup>166</sup> See Don Edwards, *The Voting Rights Act of 1965, as Amended, in THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS* 3-4 (Lorn S. Foster ed., 1985).

<sup>167</sup> See *id.*

<sup>168</sup> See *id.* at 4.

<sup>169</sup> See GROFMAN, *supra* note 91, at 10.

its power to ensure political equality for Blacks, states had erected every barrier possible to Black voters, and the Supreme Court had affirmed the existence of such barriers.<sup>170</sup> This would not change in any measurable fashion until 1965.<sup>171</sup>

### E. *The Voting Rights Act of 1965*

A series of civil rights acts were passed in the 1950s and early 1960s.<sup>172</sup> However, they did little to remove Black voter registration barriers in the South.<sup>173</sup> Following the enactment of these civil rights acts, Louisiana registration of voting-age Blacks crept from 31.7% to 31.8% between 1956 and 1965. In Mississippi, it increased from 4.4% to only 6.4% between 1954 and 1964.<sup>174</sup> In early 1965, Mississippi's population was 42% Black, but the only recorded Black officials in the entire state were the mayor and city council of the all-Black Delta town of Mound Bayou.<sup>175</sup>

In contrast, the Voting Rights Act of 1965 removed all active barriers that restricted Black voting access and returned substance to the Fifteenth Amendment.<sup>176</sup> However, the Voting Rights Act of 1965 was originally met with a great deal of opposition from Southern congressmen and conservative Northerners.<sup>177</sup> Don Edwards, a member of the House Committee on the Constitution and Civil Rights, believes that Southerners were terrified that the influx of millions of Black voters would "tip the balance of political power in many fiefdoms controlled for a hundred years by whites."<sup>178</sup> However, this resistance was replaced with rage after the murder of Viola Liuzzo, a white middle-class mother from Michigan, who was shot from a passing car

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<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

<sup>172</sup> See *id.* at 12.

<sup>173</sup> See *id.* at 12-15.

<sup>174</sup> See GROFMAN, *supra* note 91, at 15; see also *Purging of Empowerment*, *supra* note 22, at 488 (stating the Civil Rights Act of 1957 had large loopholes and did not facilitate the registration of any Blacks who were not already registered).

<sup>175</sup> See PARKER, *supra* note 134, at 28-29.

<sup>176</sup> See *id.* at 29-30. The Voting Rights Act of 1965 was a major achievement; however, Southern Whites realized that while they could not deny Blacks the right to vote, they could reduce the impact of Black voters. This was done largely through at-large and multi-member districts, gerrymandering, and by changing some offices from elective to appointive. See Eddie N. William, *Foreword* to FRANK R. PARKER, *BLACK VOTES COUNT; POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965* XV (1990).

<sup>177</sup> See Edwards, *supra* note 166, at 5.

<sup>178</sup> *Id.*

by a Ku Klux Klan member as she worked a voter registration table in Alabama.<sup>179</sup> The Act, called "the most effective piece of civil rights legislation ever passed by Congress," was signed into law on August 6, 1965.<sup>180</sup>

The Act instantly brought a halt to the use of historically racist voter registration devices, such as the literacy tests.<sup>181</sup> Congress created oversight measures to assure that states would not design creative new discriminatory devices.<sup>182</sup> Section 5 of the Act required the U.S. Attorney General or U.S. Court of Appeals to approve all proposed changes to a state's existing voting laws in order to ensure it would not discriminate against minorities.<sup>183</sup> Gerrymandering suits could be brought under section 2 of the Act, which broadly prohibited any voting procedure that denied or abridged the right to vote.<sup>184</sup>

Black voter registration exploded.<sup>185</sup> In the South by 1969, one million new Black voters were registered, resulting in a dramatic increase in the percentage of eligible Black voters from 35.5% to 64.8%.<sup>186</sup> In Mississippi, from 1964 to 1976, Black voter registration increased from 29,000 to 286,000—an increase of 886.2%.<sup>187</sup> Consequently, while fewer than 300 Blacks held offices in Southern states before the Act, the figure was over 2,000 by 1980.<sup>188</sup>

However, all voter registration obstacles were not yet removed.<sup>189</sup> Procedural barriers such as inconvenient registration sites, unrealistic site hours, and a lack of deputy registrars, accounted for a stall in the drive towards voting equality.<sup>190</sup> Due to these and other voter registration obstacles, Black voting participation rates still significantly lacked

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<sup>179</sup> See *id.*

<sup>180</sup> *Id.*; see also HANKS, *supra* note 34, at 33. For an analysis of the first two decades of the Voting Rights Act of 1965, see generally ABIGAIL M. THERNSTROM, WHO'S VOTE COUNTS? (1987); LORN S. FOSTER, THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS (1985).

<sup>181</sup> See Edwards, *supra* note 166, at 5. For new tactics of dilution, see PARKER, *supra* note 134, at 29-33.

<sup>182</sup> See Edwards, *supra* note 166, at 5.

<sup>183</sup> See *id.*

<sup>184</sup> See *id.*

<sup>185</sup> See HANKS, *supra* note 34, at 35; Edwards, *supra* note 166, at 5.

<sup>186</sup> See HANKS, *supra* note 34, at 35; Edwards, *supra* note 166, at 5.

<sup>187</sup> See Edwards, *supra* note 166, at 5. For detailed registration figures in Mississippi between 1964 and 1980, see PARKER, *supra* note 134, at 31.

<sup>188</sup> See HANKS, *supra* note 34, at 35.

<sup>189</sup> See 1988 Hearings, *supra* note 142, at 224-25 (1988) (statement of Arthur S. Flemming, Chairman, Citizens' Comm. on Civil Rights & William L. Taylor, Member, Comm. of the Citizens' Comm. on Civil Rights).

<sup>190</sup> See *id.* at 224.

proportionality.<sup>191</sup> For example, in the 1984 presidential elections, 61.4% of the white voting-age population participated, compared to only 55.8% of the eligible Black voting-age population.<sup>192</sup>

Until the National Voter Registration Act, also known as the Motor Voter Registration Act, the antiquated registration laws of exclusion still plagued Black Americans.<sup>193</sup> The Motor Voter Registration Act, which was signed into law by President Clinton on May 20, 1993,<sup>194</sup> and made mandatory to the states on January 1, 1995, attempted to reduce many of the existing voting barriers.<sup>195</sup>

### III. THE LEGISLATIVE HISTORY OF THE MOTOR VOTER REGISTRATION ACT

The Motor Voter Registration Act was enacted to eliminate restrictive voting registration barriers which have disproportionately harmed Black Americans' voter participation due to a history of political disenfranchisement.<sup>196</sup> However, the Act was passed into law only after years of bitter controversy.<sup>197</sup> Although it was signed into law in 1993, debate regarding shifting the onus of voter registration from the individual to the government began in the early 1970s.<sup>198</sup>

<sup>191</sup> See *id.* at 224–25. For data on the disproportionate numbers of Blacks elected in Mississippi, see PARKER, *supra* note 134, at 32.

<sup>192</sup> See 1988 Hearings, *supra* note 142, at 224–25.

<sup>193</sup> NVRA, *supra* note 30, §§ 1973gg(a), (b).

<sup>194</sup> *Id.*

<sup>195</sup> See generally *id.*

<sup>196</sup> *Id.* § 1973gg(a)(3).

<sup>197</sup> See *supra* notes 177, 191.

<sup>198</sup> These bills, which advocated more inclusive registration laws, either never reached a vote or were defeated. See, e.g., Universal Voter Registration Act of 1977, S. 1072, 95th Cong. (1977) (attempted to establish universal voter registration program); Universal Voter Registration Act of 1977, H.R. 5400, 95th Cong. (1977) (same); Voter Registration Act, H.R. 11552, 94th Cong. (1976) (established Voter Registration Administration in the Federal Election Commission for the purpose of administering a program through the Postal Service); Voter Registration Act, S. 1177, 94th Cong. (1975) (amended 13 U.S.C. to establish within the Census Bureau a Voter Registration Administration for the purpose of administering a voter registration program through the Postal Service); States Voter Registration Act, H.R. 6079, 94th Cong. (1975) (amending the Federal Election Commission Act of 1971 to establish within the Federal Election Commission a Voter Registration Bureau for the purpose of assisting states in improving voter registration programs); Voter Registration Act, H.R. 4093, 94th Cong. (1975) (amending 13 U.S.C. to establish within the Census Bureau a Voter Registration Administration for the purpose of administering a national voter registration program through the Postal Service); Voter Registration Act, H.R. 1686, 94th Cong. (1975) (establishing a Voter Registration Administration in the General Accounting Office for the purpose of administering a voter registration program through the Postal Service); Voter Registration Assistance Act of 1973, S. 472, 93d Cong. (1973) (amending 13 U.S.C. to establish a Voter Registration Administration in the Census Bureau to carry out a

### A. *The Journey Begins*

Of the numerous proposals of the 1970s, the only one to reach the floor in both congressional houses was a post card registration system introduced by Senator Gale McGee (D-WY).<sup>199</sup> The Senator proposed the use of a simplified registration form, a post card, to be sent to an individual's residence and available at the post office.<sup>200</sup> A portion of the card was kept as a receipt, and cards were not to be forwarded if someone moved.<sup>201</sup> To prevent fraud, the signature on the card would be verified at the polls.<sup>202</sup> There was a requirement to register thirty days before the election to allow election officials to

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program of financial assistance to the states to encourage and assist voter registration); Voter Registration Act, S. 352, 93d Cong. (1973) (amending 13 U.S.C. to establish a Voter Registration Administration in the Census Bureau for the purpose of administering a voter registration program through the Postal Service); Voter Registration Act, H.R. 8053, 93d Cong. (1973) (same); National Registration Rights Act of 1973, H.R. 4846, 93d Cong. (1973) (amending the Voting Rights Act of 1965 to safeguard the constitutional and civil liberties of American citizens with regard to lawful guarantees of participation in the democratic process); Voter Registration Act, H.R. 580, 93d Cong. (1973) (amending 13 U.S.C. to establish within the Census Bureau a National Voter Registration Administration for the purpose of administering a voter registration program through the Postal Service); Voter Registration Assistance Act of 1972, S. 3420, 92d Cong. (1972) (amending 13 U.S.C. to establish a Voter Registration Administration in the Census Bureau to carry out a program of financial assistance to the states to encourage and assist voter registration); National Voter Registration Act, S. 2574, 92d Cong. (1971) (amending 13 U.S.C. to establish in the Census Bureau a National Voter Registration Administration for the purpose of a voter registration program through the mail); Universal Voter Registration for Federal Elections, S. 2457, 92d Cong. (1971) (establishing a system of universal registration for federal elections); National Federal Voter Registration Act of 1971, S. 2445, 92d Cong. (1971) (providing for nationwide registration of voters for federal offices); Universal Enrollment Act of 1971, S. 1199, 92d Cong. (1971) (amending 13 U.S.C. allowing for the Census Bureau to undertake a quadrennial enrollment of voters for presidential elections who met all state qualifications except residency); Canvass of the Election Process, H.R. 12016, 92d Cong. (1971) (amending 13 U.S.C. to have Census Bureau establish a program of electoral canvassing); Voter Rights Act Amendments of 1971, H.R. 10442, 92d Cong. (1971) (establishing a system of automatic voter registration); Universal Enrollment Act of 1971, H.R. 6088, 92d Cong. (1971) (amending 13 U.S.C. for Census Bureau to undertake a quadrennial enrollment of voters for presidential elections who meet all state qualifications except residency); Universal Enrollment Act of 1970, S. 4238, 91st Cong. (1970) (amending 13 U.S.C. by authorizing the Secretary of Commerce through the Census Bureau to undertake a quadrennial enrollment of those persons that meet the qualifications of the various states other than residency for presidential elections); Universal Enrollment Act of 1970, H.R. 19010, 91st Cong. (1970) (same). Mark Thomas Quinlivan, *One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration*, 137 U. PA. L. REV. 2361, 2388-89, n.172 (1989).

<sup>199</sup> See 1988 Hearings, *supra* note 142, at 195. At this time only three states had experimented with some form of post card registration (Texas, California, and Kentucky). See *id.* at 195-96.

<sup>200</sup> See *id.* at 195.

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

check fraudulent forms and compile a federal register.<sup>203</sup> The bill passed the Senate by twenty votes, but failed in the House by seven votes.<sup>204</sup>

In the 1986 mid-term elections, voter participation was a dismal 37.2%, and in the 1988 presidential elections it was only 50.1%.<sup>205</sup> Ninety million Americans did not vote in the 1988 election.<sup>206</sup> It was the lowest voter turnout rate since 1924.<sup>207</sup> Senator Edward Kennedy (D-MA) stated that "[i]n one survey, 37 percent of non-voters said they could not vote because they were not registered and two-thirds of that group said they would have voted if they were registered."<sup>208</sup> Almost 70% of these non-voters cited the burden imposed by mechanical procedures for their failure to register.<sup>209</sup> These restrictive registration procedures have a disproportionate negative impact on "minorities who have suffered most from discrimination."<sup>210</sup> Senator Kennedy continued:

[I]n 20 of 28 states for which the Census Bureau maintains separate data by race, [B]lack registration trails white registration by an average of almost 9 percentage points, and numerous studies indicate that the discriminatory impact is actually worse because [B]lacks are more likely than whites to over-report being registered.<sup>211</sup>

As a result of these horrifying statistics, the "National Voter Registration Act of 1989" ("H.R. 2190") was introduced and debated before the House.<sup>212</sup> H.R. 2190 was established to ease the burden of voter registration by standardizing the registration procedures for federal

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<sup>203</sup> See *id.*

<sup>204</sup> See *1988 Hearings*, *supra* note 142, at 195.

<sup>205</sup> SEE POLSBY & WILDAVSKY, *supra* note 8, at 5.

<sup>206</sup> See *Equal Access to Voting Act of 1989: Hearings on S. 675 Before the Subcomm. on the Const. of the Comm. on the Judiciary*, 100th Cong. 31 (1989) (statements of Hon. Cranston) [hereinafter *Hearings on S. 675*]. This is an increase of 10 million over the last presidential election. See *id.*

<sup>207</sup> See Richard L. Berke, *50.16% Voter Turnout Was Lowest Since 1924*, N.Y. TIMES, Dec. 18, 1988, at A36.

<sup>208</sup> *Hearings on S. 675*, *supra* note 206, at 21 (statements of Sen. Edward Kennedy).

<sup>209</sup> See Squire, *supra* note 33, at 232. People cited the following reasons for not registering: recently moved and did not re-register (47%), worked during registration hours (11%), did not know how to register (6%), registration offices too far from home (3%), did not register because not interested in politics (17%). See *id.*

<sup>210</sup> *Hearings on S. 675*, *supra* note 206, at 21 (statements of Sen. Edward Kennedy).

<sup>211</sup> *Id.*

<sup>212</sup> H.R. 2190, 101st Cong. (1989). A number of similar bills were introduced in the 100th and 101st Congresses, none reached the floor of either the House or the Senate. See, e.g.,

offices, thereby increasing the number of registered voters.<sup>213</sup> The bill contained three major provisions: (1) driver's licenses shall serve as voter registration applications if the individual does not decline;<sup>214</sup> (2) eligible individuals may mail in voter registration cards without the requirement of notarization;<sup>215</sup> and (3) agency-based registration shall be available in fishing and hunting bureaus, public assistance centers, post offices, and unemployment offices.<sup>216</sup> In addition, states would designate additional offices to distribute and accept completed forms.<sup>217</sup>

As with previous registration reforms, H.R. 2190 was strongly opposed by many House members.<sup>218</sup> In addition, President Bush believed that the bill would be extremely costly and subject to instances of fraud.<sup>219</sup> However, the House overcame Republican opposition and President Bush's veto threat, and passed H.R. 2190 on February 6, 1990, by a final vote of 289-132.<sup>220</sup>

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Universal Voter Registration Act of 1988, S. 2061, 100th Cong. (1988) (establishing national standards for elections for federal offices); Universal Voter Registration Act of 1988, H.R. 3950, 100th Cong. (1988); Universal Voter Registration Act of 1987, S. 1888, 100th Cong. (1987); Voter Registration Act of 1987, S. 1405, 100th Cong. (1987) (amending 39 U.S.C. to provide that change-of-address forms submitted to the Postal Service be furnished to the appropriate authority for voter registration purposes); Universal Voter Registration Act of 1987, H.R. 3666, 100th Cong. (1987) (establishing national standards for voter registration); Voter Participation Act of 1987, H.R. 3023, 100th Cong. (1987) (providing for election day and mail registration for federal elections); Voter Registration Act, H.R. 2750, 100th Cong. (1987) (amending 39 U.S.C. to provide that change-of-address forms submitted to the Postal Service be furnished to the appropriate state authority for voter registration purposes); Voter Registration Act of 1985, S. 1439, 99th Cong. (1985); Postage Free Election Material, S. 1420, 99th Cong. (1985) (amending 39 U.S.C. to provide that voter registration forms, among others, be mailed by election agencies free of postage); Free Postage Election Participation Act, H.R. 2216, 99th Cong. (1985) (amending 39 U.S.C. to provide that voter registration forms, among others, be mailed by election agencies free of postage); Voter Registration Act of 1985, H.R. 1668, 99th Cong. (1985) (amending 39 U.S.C. to provide that change-of-address forms submitted to the Postal Service be furnished to the appropriate state authority for voter registration purposes); Registration Deadline Elimination Act of 1985, H.R. 1454, 99th Cong. (1985) (protecting the voting rights guaranteed by the Fourteenth and Fifteenth Amendments by preventing inappropriate registration procedures); Postcard Registration Act of 1985, H.R. 1453, 99th Cong. (1985) (protecting voting rights by eliminating certain barriers to participation in federal elections). Quinlivan, *supra* note 198, at 2388 n.171.

<sup>213</sup> See H.R. REP. NO. 101-243, at 7 (1990).

<sup>214</sup> See *id.* § 103.

<sup>215</sup> See *id.* § 104; under penalty of perjury.

<sup>216</sup> See *id.* § 105.

<sup>217</sup> See *id.*

<sup>218</sup> See *Senate Republicans Kill 'Motor Voter' Bill*, CONG. Q. ALMANAC, 101st Cong. 2d Sess., at 71 (1990).

<sup>219</sup> See *id.*

<sup>220</sup> See *id.* at 72.

On May 1, 1989, Senator Wendall Ford (D-KY) sponsored the Senate's companion bill, S. 874. Due to amendments, S. 874 differed from H.R. 2190 in the following respects: (1) it contained no provision for removing the names of registered voters from the rolls, leaving it to the states; (2) it provided that the Federal Election Commission have a regulatory role in voter participation; and (3) it did not authorize any federal funds.<sup>221</sup>

On September 26, 1990, the Senate debated the bill and voted to cease floor debate in order to allow a final vote for passage.<sup>222</sup> Sixty votes were needed for closure; however, the motion fell five votes short.<sup>223</sup> Therefore, the bill died in the Senate without ever receiving an actual vote for passage.<sup>224</sup>

Senator Ford was not discouraged by yet another Congressional failure to pass voter registration reform. On January 31, 1991, he introduced the National Voter Registration Act of 1991, S. 250.<sup>225</sup> The bill, nicknamed the "Motor Voter Bill," would enable people to register to vote when applying for or renewing a driver's license, by an application through the mail or in person at designated federal, state, or non-governmental locations.<sup>226</sup> It was estimated the bill would increase the eligible voter registration rate from 60% to 90%.<sup>227</sup>

In March and April of 1991, the Senate Rules and Administration Committee debated the bill.<sup>228</sup> Although the bill represented the greatest move towards voting equality since the Voting Rights Act of 1965, there were still major criticisms, such as a lack of federal funds to offset the cost to counties<sup>229</sup> and increased voting fraud.<sup>230</sup> However, these concerns were offset by the potential gains from including millions more in the democratic process, and S. 250 passed the Senate on May 21, 1992.<sup>231</sup> The House agreed upon S. 250 on June 16, 1992.<sup>232</sup>

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<sup>221</sup> See *Voter Registration*, 69 CONG. DIG. 98, 107 (Apr. 1990).

<sup>222</sup> See *Senate Republicans Kill 'Motor Voter' Bill*, *supra* note 218, at 72.

<sup>223</sup> See *id.*

<sup>224</sup> See *id.*

<sup>225</sup> S. 250, 102d Cong. (1991).

<sup>226</sup> 137 CONG. REC. S1086 (daily ed. Jan. 23, 1991).

<sup>227</sup> See 137 CONG. REC. S11534 (daily ed. July 31, 1991).

<sup>228</sup> See generally S. REP. NO. 102-60 (1991).

<sup>229</sup> See 69 CONG. DIG. 127 (Apr. 1990).

<sup>230</sup> See S. REP. NO. 102-60, at 3 (1991).

<sup>231</sup> See 138 CONG. REC. H3680 (daily ed. May 21, 1992).

<sup>232</sup> See H.R. RES. 480, 102d Cong. (1992), *cited in* 138 CONG. REC. H4702 (daily ed. June 16, 1992).



The victory was short lived when President George Bush vetoed the legislation on July 2, 1992.<sup>233</sup> The President called the bill "an open invitation to fraud and corruption."<sup>234</sup> The Senate tried to override the veto and save this valuable piece of legislation, but failed.<sup>235</sup> Senator Ford, a long time supporter of registration reform legislation, said, "I do not understand why the Republican side of the aisle is so vehemently opposed [to allowing] people to reconnect with their government."<sup>236</sup>

### B. *The Voter Registration Act of 1993*

When President William Jefferson Clinton was elected to the executive office, new hope for the passage of the "Motor Voter" legislation was born.<sup>237</sup> The Voter Registration Act of 1993 (H.R. 2) was considered in the House and passed on February 4, 1993.<sup>238</sup> The House bill passed with a strong vote of 249-170.<sup>239</sup>

The same bill was introduced into the Senate (S. 460) on March 10, 1993.<sup>240</sup> However, due to Republican opposition, floor debate and back-door meetings among party leaders ensued.<sup>241</sup> The Republican party opposition stuck together, threatening a filibuster that would kill the bill once again.<sup>242</sup>

One of the principle compromises, offered in an effort to appease the Republican party leaders, was that a state "may" provide registration forms at public assistance offices.<sup>243</sup> This altered the earlier version that would have made the existence of forms at unemployment offices, welfare offices, and agencies which assist the disabled, mandatory.<sup>244</sup>

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<sup>233</sup> See 138 CONG. REC. S9772 (daily ed. July 2, 1992) (presidential veto message).

<sup>234</sup> *Id.*

<sup>235</sup> See 138 CONG. REC. S14616-19 (daily ed. Sept. 22, 1992).

<sup>236</sup> See Chuck Alston, *Democrats Flex New Muscle With Trio of Election Bills*, CONG. Q. ALMANAC, Mar. 20, 1993 (alteration in original).

<sup>237</sup> See *Goodbye Gridlock, Hello Steamroller*, TIME, Mar. 29, 1993, at 11. The NVRA was passed largely due to the two year period from 1993-95 during which the Democrats occupied both houses of Congress and the White House. See *id.*; see also S. REP. NO. 103-06, at 50-57 (1993) (stating minority views).

<sup>238</sup> See 139 CONG. REC. H505 (daily ed. Feb. 4, 1993).

<sup>239</sup> See *id.*

<sup>240</sup> See S. 460, 103d Cong., 139 CONG. REC. S2576 (1993).

<sup>241</sup> See Richard Sammon, *Senate Approves "Motor Voter" With Concessions to the GOP*, CONG. Q. WKLY. REP., Mar. 20, 1993, at 664 [hereinafter Sammon, *Senate Approves "Motor Voter"*].

<sup>242</sup> See *id.* The Democrats had 57 Senators; therefore, they needed the support of 3 Republicans to gain the 60 votes needed for closure on the bill. See *id.*

<sup>243</sup> See *id.*

<sup>244</sup> See *id.*

Prior to the change in this one word, the bill failed.<sup>245</sup> On March 16, the bill fell one vote shy of the 60 votes required for closure due to a Republican filibuster.<sup>246</sup> The Republicans maintained that requiring voter registration at public assistance agencies would result in citizens "feel[ing] pressured into registering to vote before asking for benefit checks or other forms of help."<sup>247</sup>

Democratic leaders called the original provision a great way to include citizens who might be left out because they do not own cars.<sup>248</sup> Majority Leader George J. Mitchell (D-ME), called the dispute "pathetic," stating "they [Republicans] don't have enough confidence in their own candidates and their own positions, so they try to prevent the registration of more voters."<sup>249</sup> Edward A. Hailes, counsel for the National Association for the Advancement of Colored People, called the modification "disastrous" and that "[w]e cannot support this bill now. No way."<sup>250</sup>

At a House-Senate Conference, Senator Dave Durenberger of Minnesota offered alternative language that would appease both sides on this provision.<sup>251</sup> The language required "public agencies to make it clear to beneficiaries of public assistance that registering to vote is entirely optional and that not registering will not affect the amount of assistance one receives."<sup>252</sup> However, the final conference bill omitted unemployment benefit agencies as required registration cites.<sup>253</sup>

The House voted 259–164 to adopt the conference report on the bill on May 5, 1993.<sup>254</sup> The Senate voted on May 11, 1993, to accept

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<sup>245</sup> See *id.*

<sup>246</sup> See Sammon, *Senate Approves "Motor Voter,"* *supra* note 241, at 664. The final vote was 59–41. See *id.*

<sup>247</sup> Richard Sammon, *Negotiations Begin on "Motor Voter,"* CONG. Q. WKLY. REP., Apr. 3, 1993, at 837.

<sup>248</sup> See *id.*

<sup>249</sup> Sammon, *Senate Approves "Motor Voter,"* *supra* note 241, at 664.

<sup>250</sup> *Id.*

<sup>251</sup> See Richard Sammon, *Deal May Speed Up "Motor Voter,"* CONG. Q. WKLY. REP., May 1, 1993, at 1080.

<sup>252</sup> *Id.* This language was offered to attract enough Republican Senators to reach the needed 60 votes and pass the measure. See *id.* Conferences also dropped language written by Sen. Alan Simpson (R-WY) that would have enabled states to selectively require documentation of citizenship upon request. See *id.* This was believed to result in discrimination against voters who have foreign or foreign sounding names. See *id.*

<sup>253</sup> See 139 CONG. REC. H2264 (daily ed. May 5, 1993); Richard Sammon, *House OKs "Motor Voter" For Final Senate Voter,* CONG. Q. WK. REP., May 8, 1993, at 1144 [hereinafter Sammon, *House OKs "Motor Voter"*].

<sup>254</sup> See Sammon, *House OKs "Motor Voter,"* *supra* note 253, at 1144.

the House-Senate compromised bill, 62-36.<sup>255</sup> Six Republicans joined the fifty-six Democrats on the final bill, two more than needed to avoid the filibuster.<sup>256</sup> The bill was signed by President Clinton on May 20, 1993.<sup>257</sup>

Some states were reluctant to institute the program.<sup>258</sup> Resistance was based on the imposition of unfunded federal mandates challenged under Article 10 of the Constitution,<sup>259</sup> as infringing upon the sovereign independence of state agencies.<sup>260</sup> Six states, California,<sup>261</sup> Pennsylvania, Illinois, South Carolina, Michigan, and Virginia, initially blocked the Act's implementation and accordingly were sued by the U.S. Department of Justice for non-compliance. Today, the constitutional debate has largely ended because in all six cases the NVRA was upheld by federal district courts, and two of the cases were affirmed by federal appellate courts.<sup>262</sup>

The NVRA was required to be implemented by all states in Federal elections by January 1, 1996.<sup>263</sup> Therefore, the presidential election in 1996 provides the first data on the impact of the Act on the desired end— increased voter participation for all Americans.

#### IV. MEASURING THE ACT'S SUCCESS

Since the passage of the "Motor Voter Act," opposition has continued.<sup>264</sup> A group of Republican senators have targeted the law for removal.<sup>265</sup> Two bills were introduced in 1994 attempting to repeal the NVRA.<sup>266</sup> Therefore, successful registration rates combined with higher voter participation would anchor the law as solid policy.

<sup>255</sup> *See id.*

<sup>256</sup> *See id.* The Republican Senators were Dave Durenburger (MN), Mark O. Hatfield (OR) (a co-sponsor of the bill); Arlen Specter (PA); James M. Jeffords (VT); Pete V. Domenici (NM) and Bob Packwood (OR). William Cohen (ME) voted for closure on the bill but against the final measure. Bob Packwood did not vote for closure but voted for the final bill. *See id.*

<sup>257</sup> *See* Act of May 20, 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified in 42 U.S.C. § 1973gg).

<sup>258</sup> *See generally* Kevin K. Green, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J. LEGIS. 45 (1996) (evaluating the constitutional challenges to NVRA).

<sup>259</sup> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

<sup>260</sup> *See generally* Green, *supra* note 258.

<sup>261</sup> *See generally* Wilson v. United States, 60 F.3d 1411 (9th Cir. 1995).

<sup>262</sup> *See* Green, *supra* note 258, at 50.

<sup>263</sup> *See* NVRA, *supra* note 30, at § 1973gg.

<sup>264</sup> *See* Richard Sammon, *Senators Strike at Motor-Voter Law*, CONG. Q. WKLY. REP., Jan. 14, 1995, at 151 [hereinafter Sammon, *Senators Strike at Motor-Voter Law*]. However, there is speculation that President Clinton would veto any attempt to overturn the law. *See id.*

<sup>265</sup> *See id.*

<sup>266</sup> *See* S. 218, 104th Cong. (1995); H.R. 370, 104th Cong. (1995).

### A. Election Data

Although there have been millions of individuals added to the registration rolls, actual participation rates have been disappointing.<sup>267</sup> In 1994, only 37% of the eligible Blacks voted compared to 47% of whites.<sup>268</sup> On January 1, 1996, the law was made mandatory on the states.<sup>269</sup> Approximately twenty million Americans registered to vote or updated their registration between 1995 and June 1996, and nine million of the first time registrars were Black.<sup>270</sup> Yet, only 48.8% of the voting age population voted in the 1996 presidential election.<sup>271</sup> It was the lowest turnout in any election since 1924, and the second lowest since 1824 in a presidential election.<sup>272</sup>

Democratic pollster Celinda Lake said turnout was actually down among young and minority voters.<sup>273</sup> Fifty-one percent of whites participated in the election compared to only 35% of Blacks.<sup>274</sup> Between 1992 and 1996, Black male voters increased from 3.1 million to 4.8 million (from 3% to 5% of the electorate); yet, the number of Black women voters fell from 5.1 million to 4.8 million (remaining at 5%).<sup>275</sup> Political scientist Curtis Gans said, "[T]he ease of registration can only create the opportunity to vote."<sup>276</sup> He noted, "voting, on the other hand, depends on motivation, which has been increasingly lacking."<sup>277</sup>

Florida provides a microcosm of the national problem of low participation rates.<sup>278</sup> Only half of its registered voters have voted in the last five presidential elections.<sup>279</sup> In Florida, there are several rea-

<sup>267</sup> See *infra* notes 270-72.

<sup>268</sup> See *Minorities Take Leave of Democracy*, *supra* note 26, at B2.

<sup>269</sup> See NVRA, *supra* note 30.

<sup>270</sup> See Vic Ostrowidzki, *Low Voter Turnout Still a Problem*, TIMES UNION, Nov. 3, 1996, at E6. Data is based on a study by SERVE, a New York group that promotes voter participation. See *id.*; see also Charmagne Helton & Lucy Soto, *Democrats Counting Heavily on Black Vote; The "Motor Voter" Law is Expected to Increase Minority Turnout This Year*, ATLANTA J. & CONST., Nov. 4, 1996, at 3B.

<sup>271</sup> See Lawrence M. O'Rourke, *Experts Spread the Blame for Low Turnout*, SACRAMENTO BEE, Nov. 8, 1996, at A4.

<sup>272</sup> See *id.*

<sup>273</sup> See *id.*; see also *Minorities Take Leave of Democracy*, *supra* note 26 (stating the 1994 Black participation rate was 37%).

<sup>274</sup> See Minzesheimer, *supra* note 28, at 4A. In 1992, 67.6% of whites voted, 48% of Blacks, and 28.9% of Hispanics. See Ostrowidzki, *supra* note 270, at E6.

<sup>275</sup> See Jonathan Tilove, *U.S. Black Men Find Power of the Polls; Unprecedented Voter Turnout Linked to Million Man March*, TORONTO STAR, Dec. 5, 1996, at A33.

<sup>276</sup> O'Rourke, *supra* note 271, at A4.

<sup>277</sup> *Id.*

<sup>278</sup> See Gerald Shields, *Decision Time is Here; Voting is Not Very Popular in Florida*, ORLANDO SENTINEL, Nov. 5, 1996, at A1.

<sup>279</sup> See *id.*

sons for voter apathy.<sup>280</sup> "One reason is its transient population. Another is its more stringent voter registration deadlines. And third is its history of disenfranchisement among minority voters."<sup>281</sup>

There are alternative registration programs, used by numerous states, that have consistently had higher voter participation rates than the national system.<sup>282</sup> In the 1996 presidential elections, Maine had the highest turnout nationwide with 64%, followed by Minnesota at 62.9%, and Montana at 62.6%.<sup>283</sup> Not surprisingly, these states have more liberal voter registration laws than is mandated by "Motor Voter."<sup>284</sup> Minnesota, Wisconsin, Idaho, New Hampshire, and Maine allow voter registration on election day itself, and North Dakota requires no voter registration at all.<sup>285</sup>

## V. INCREASING VOTER REGISTRATION AND PARTICIPATION

At a recent forum on minority voting at Virginia Union University, the sparse audience of approximately two dozen spoke volumes about the problem of minority political participation even with NVRA.<sup>286</sup> "We [minority voters] have a voice if we use it," said Roxie Raines Kornegay, executive director of the Virginia Council on Human Rights.<sup>287</sup> "We exclude ourselves from the table simply because we do not use the voice we have."<sup>288</sup> Robert Holsworth, a Virginia political scientist, conducted a study that found "four of Richmond's [Virginia] nine wards have voter registration rates below 50 percent, an alarming fact that reflects disengagement from the political arena."<sup>289</sup>

As previously cited, there have been numerous voter registration programs proposed over the years.<sup>290</sup> For example, in 1989, Congress proposed H.R. 17 which would have entirely removed voter pre-registration requirements for federal elections by allowing election-day reg-

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<sup>280</sup> See *id.*

<sup>281</sup> *Id.*

<sup>282</sup> See O'Rourke, *supra* note 271, at A4.

<sup>283</sup> See *id.*

<sup>284</sup> See Ostrowidzki, *supra* note 270, at E6.

<sup>285</sup> See *id.*

<sup>286</sup> See Christine Neuberger, *Forum on Minority Voting Power Sees Much Apathy, Great Potential*, RICHMOND TIMES DISPATCH, Oct. 20, 1996, at B1.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> See text accompanying *supra* notes 198, 212.

istration.<sup>291</sup> The Act would significantly benefit racial minorities' voter registration and participation rates.<sup>292</sup>

### A. Election-Day Registration

Almost all states have a closing date for voter registration—a set date before an election that is the last day an eligible party can register.<sup>293</sup> This has been deemed the most important variable in reconciling different voting rates between the states.<sup>294</sup> The likelihood that an individual will vote is directly related to one's motivation to vote and the costs associated with it.<sup>295</sup> Therefore, the "easier it is for a person to cast a ballot, the more likely he is to vote."<sup>296</sup> Generally, the closer a closing date is to the actual election day, the higher the voter turnout.<sup>297</sup> This is illustrated by states that allow registration on election day (Maine, Minnesota, Wisconsin), or no registration at all (North Dakota), having voter turnout percentages twelve points higher than the rest of the country.<sup>298</sup>

Election day registration allows eligible citizens to register when their interest is at its peak.<sup>299</sup> For instance, during the last month of a campaign, advertising and debates usually begin intensifying over the last two weeks.<sup>300</sup> During this period an individual's awareness is at its maximum.<sup>301</sup> However, those that have become interested at this point have missed the registration deadline.<sup>302</sup> Therefore, there is no correlation between the degree of stimulation and voter participation.<sup>303</sup>

<sup>291</sup> See Universal Voter Registration Act of 1989, H.R. 17, 101st Cong. (1989) (introduced by Rep. Conyers).

<sup>292</sup> Since this Note is premised on the conclusion that Black Americans are disproportionately disadvantaged due to restrictive registration laws, it follows that any liberalization would have a greater proportionate effect on them.

<sup>293</sup> See Squire, *supra* note 33, at 232–33.

<sup>294</sup> See *id.* at 233.

<sup>295</sup> See RAYMOND WOLFINGER AND STEPHEN ROSENSTONE, WHO VOTES? 8 (1987) *cited in 1988 Hearings, supra* note 142, at 439 (statement by Rep. Hamilton Fish, Jr., D-NY).

<sup>296</sup> *Id.*

<sup>297</sup> See *id.*

<sup>298</sup> See Squire, *supra* note 33, at 234. Squire provides a complete listing of states with closing dates and voter turnout rates during the 1988 election. See *id.* In 1988, the four states had a mean voter turnout of 62%. The national average was 50.2%. See *id.*

<sup>299</sup> See 1989 *Hearings, supra* note 22, at 138 (remarks of Jesse Jackson, President, National Rainbow Coalition).

<sup>300</sup> See *id.*

<sup>301</sup> See *id.*

<sup>302</sup> See *id.*

<sup>303</sup> See *id.*

The "Universal Voter Registration Act of 1989," which would have instituted election-day registration nationwide, was written in part because "restrictions on the ability to register have disproportionately harmed voter participation by various groups, including racial minorities."<sup>304</sup> In fact, one Congressman even went so far as to call it "a civil rights bill."<sup>305</sup>

Rainbow Coalition President Jesse Jackson believes same-day registration "would remove the single greatest barrier to voting in our Nation [pre-registration]; [and] for the first time in our Nation's history, breathe life into the one person, one vote concept upon which our democratic society stands,"<sup>306</sup> and that the Voting Rights Act itself was "incomplete" without election-day registration.<sup>307</sup>

The Committee for the Study of the American Electorate conducted a study, commissioned by the Ford Foundation, titled "Creating the Opportunity."<sup>308</sup> It evaluated how various changes in voter laws would affect registration and turnout by comparing substantive changes in state law to the voting data in subsequent years.<sup>309</sup> The study estimated that nationally instituted election-day registration would impact actual turnout in presidential elections by an increase of 6,252,000 voters.<sup>310</sup> This was the greatest impact of any change in the registration law evaluated, largely because it removes two major voting barriers.<sup>311</sup> It eliminates any time gap between the act of registration and voting, and it makes voting a one-step rather than a two-step process.<sup>312</sup>

The study also evaluated the two major provisions of the "motor voter" legislation; driver's license registration and mail-in registration.<sup>313</sup> It was estimated that voter registration would increase by 5,785,000 for license registration and 570,000 for mail-in registration.<sup>314</sup>

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<sup>304</sup> H.R. 17, *supra* note 291, at § 2(5).

<sup>305</sup> 1989 *Hearings*, *supra* note 22, at 137 (remarks by Rep. Al Swift, Chairman of the Subcomm.).

<sup>306</sup> *Id.* at 136 (remarks of Jesse Jackson, President, National Rainbow Coalition).

<sup>307</sup> *Id.* at 137.

<sup>308</sup> See 1988 *Hearings*, *supra* note 142, at 281-82 (statement of Curtis Gans, Committee for the Study of the American Electorate).

<sup>309</sup> See *id.*

<sup>310</sup> See *id.* at 282. The study admits that there are some caveats in generalizing from the states that have one-step voter registration. For example, in Maine one must register at a different place than where one actually votes. In the others, one may vote and register in the same place. In addition, these states have a generally homogeneous population, with a history of high voter turnout, low incidents of voter fraud, and a tradition of good civic duty. See *id.* at 281.

<sup>311</sup> See *id.* at 281-82.

<sup>312</sup> See *id.* at 311.

<sup>313</sup> See 1988 *Hearings*, *supra* note 142, at 309.

<sup>314</sup> See *id.*

However, the study estimated that these two components would only increase actual turnout by 780,000 and 255,000 respectively.<sup>315</sup>

Opponents challenge the liberalization of registration laws as an infringement on state autonomy; however, the court decisions in the NVRA cases illustrate that election day registration would also be held constitutional.<sup>316</sup> Opponents also claim liberalization will result in an influx of Democratic party voters.<sup>317</sup> However, NVRA has also proved this concern is minimal or even non-existent.<sup>318</sup>

Another claim is that election day registration will result in many voters, who otherwise would have registered earlier, to wait until election day.<sup>319</sup> This would result in increased administrative burdens for voting registration offices.<sup>320</sup> However, as former New York City Mayor David Dinkins testified before Congress, this fear could work as a benefit.<sup>321</sup> It would provide a tremendous incentive to local election officials to register the maximum number of citizens possible prior to elections—resulting in more widely instituted outreach programs.<sup>322</sup>

The remaining concern is increased voter fraud.<sup>323</sup> It has been asserted that long registration deadlines enable state officials to evaluate a voter's legitimacy and decrease voter fraud.<sup>324</sup> In fact, the Supreme Court, in *Marston v. Lewis*, upheld an extremely long registration deadline.<sup>325</sup> Arizona's registration deadline of fifty days before the election was found to be reasonable by the state's asserted interest in preparing adequate voter lists.<sup>326</sup> The Court noted that "[s]tates have [a] valid and sufficient interest in providing for *some* period of time—

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<sup>315</sup> See *id.* at 307.

<sup>316</sup> See generally Green, *supra* note 258.

<sup>317</sup> See Elizabeth Levitan Spaid, 'Motor-Voter' May Steer Future Election Outcomes, CHRISTIAN SCI. MONITOR, Apr. 3, 1995, at 3 (concluding although most thought Democrats would make up most new registrations, Independents total a significant number).

<sup>318</sup> See *id.*

<sup>319</sup> See RICHARD G. SMOLKA, ELECTION DAY REGISTRATION: THE MINNESOTA AND WISCONSIN EXPERIENCE IN 1976 65 (1977).

<sup>320</sup> See *id.* at 66.

<sup>321</sup> See 1988 Hearings, *supra* note 142, at 448 (remarks of David N. Dinkins, President, Borough of Manhattan, New York City).

<sup>322</sup> See *id.*

<sup>323</sup> See SMOLKA, *supra* note 319, at 65–69 (concluding ability for fraud is great while voter turnout gains are minimal); see also David B. Hill, *No—On-Site Voter Registration is Not Desirable*, in CONTROVERSIAL ISSUES IN PRESIDENTIAL SELECTION, *supra* note 33, at 247.

<sup>324</sup> See *id.* at 243.

<sup>325</sup> *Marston v. Lewis*, 410 U.S. 679, 679 (1973); see also *Burns v. Fortson*, 410 U.S. 686, 686 (1973) (upholding Georgia's 50 day requirement).

<sup>326</sup> See *Marston*, 410 U.S. at 681.



prior to an election—in order to prepare adequate voter records and protect its electoral process from possible frauds.”<sup>327</sup>

However, proposed election day registration laws contain significant procedural safeguards.<sup>328</sup> The 1989 Act would have allowed such registration only at the polling place where an individual could vote,<sup>329</sup> and included specific requirements to establish voter identity.<sup>330</sup> This included completing a standardized form<sup>331</sup> and submitting one of the specifically approved forms of identification.<sup>332</sup> In addition, each ballot from an individual registering on election day was kept separate from those previously registered, for up to ten days, to determine that all votes were properly cast.<sup>333</sup> Finally, all individuals who registered on election day were mailed a non-forwardable registration verification card.<sup>334</sup> Cards that were returned as non-deliverable were evaluated by an election official to determine if the return was a result of clerical or similar error.<sup>335</sup> If a case was not resolved, it was forwarded to the United States Attorney and could result in prosecution.<sup>336</sup>

In fact, fear of increased fraud is based largely on assumptions that there is a direct relationship between non-restrictive voter registration laws and voter fraud.<sup>337</sup> However, this view is inaccurate, as indicated by national election data.<sup>338</sup> For example, North Dakota, the only state without any registration requirement, has conducted fraud-free elections for years.<sup>339</sup> In most states, when there is election fraud, it is more likely to be conducted by election officials than by private individuals, and at the voting rather than the registration stage.<sup>340</sup> “Registration restrictions thus are ineffective means of combating the more prevalent forms of voter fraud.”<sup>341</sup>

<sup>327</sup> *Id.* at 680.

<sup>328</sup> See H.R. 17, *supra* note 291.

<sup>329</sup> See *id.* § 6(a)(1), (2).

<sup>330</sup> See *id.* § 6(b) (Establishment of Voter Identity).

<sup>331</sup> See *id.* § 6(b)(B)(i).

<sup>332</sup> See *id.* § 6(b)(B)(ii).

<sup>333</sup> See H.R. 17, *supra* note 291, at § 6(b)(B)(4)(A)(ii).

<sup>334</sup> See *id.* § 6(b)(B)(4)(C).

<sup>335</sup> See *id.*

<sup>336</sup> See *id.*

<sup>337</sup> See Cunningham, *supra* note 25, at 396.

<sup>338</sup> See *id.*

<sup>339</sup> See *id.*

<sup>340</sup> See Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 YALE L. J. 1615, 1635 (1987); see also Cunningham, *supra* note 25, at 396.

<sup>341</sup> James, *supra* note 340, at 1635.

## VI. CONCLUSION

In the presidential election of 1876, participation was more than 82% of all potential voters, not just registered individuals. Soon thereafter, harsh registration restrictions were instituted, "cloaked in rhetoric about stopping corruption but aimed at keeping down the vote of 'undesirable elements' [immigrants and Black voters]—which they did."<sup>342</sup> As a result, lower voter participation rates were not due to a decline in Americans' desire to participate, but in the status quo's desire for voting equality.<sup>343</sup>

The power to vote is an important one that can better an individual's life or change the leader of a nation. In 1960, President John F. Kennedy, defeated Richard Nixon by fewer than 115,000 popular votes.<sup>344</sup> In our political system, the right to choose not to vote is also extremely important.<sup>345</sup> However, abstention from the democratic process should be a decision made by the individual and not imposed upon him by the failure to trudge through the bureaucratic process.<sup>346</sup> Raymond Wolfinger and Steven Rosenstone observe that "for most Americans, voting is the only form of political participation."<sup>347</sup> Therefore, the removal of unnecessary obstacles to voting helps enhance public involvement in American government and adds to the strength of our participatory government.

The Motor Voter Act was a significant step to improving political participation among traditionally disenfranchised groups—particularly Black Americans. However, its modest gains illustrate that registration barriers still exist. Election-day registration has a proven track record of success. Only if the federal government continues to strive to fulfill its responsibility to ensure equal opportunity for political participation, can we be assured the possibility of a true representational government.

